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LEE CHOON KIAT

v.

SJ SECURITIES SDN BHD

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HIGH COURT MALAYA, SHAH ALAM
NOR BEE ARIFFIN JC
[CIVIL SUIT NO: MT6-22-35-1999]
20 FEBRUARY 2009

- C **CONTRACT:** Breach - Shares - Sale and delivery of shares - Whether the trade that was transacted with defendant's approval constituted a purchase of 244,000 shares at RM9 per share with 245,000 shares free of delivery and free of payment as contained in the buy slip and not just the 244,000 shares - Whether free shares part of direct deal - Defendant
- D estopped from denying any contractual link with plaintiff over free shares - Whether contract note did not reflect deal on the free shares

- E **CONTRACT:** Agency - Contractual relationship - Whether it was intended that defendant be an agent or the defendant was actually contractually bound by terms in buy slip to deliver the shares stipulated there - Entire circumstances to be looked at - Transaction involved a crossing direct deal between defendant and TA Securities Sdn Bhd - Defendant represented plaintiff in the whole transaction until completion of direct deal - Contracts Act 1950, s. 183

- F **EVIDENCE:** Adverse inference - Evidence Act 1950, s. 114(g) - Failure to produce tape recording - Whether adverse inference would be drawn - Tape was in defendant's possession, custody and control - Whether production of tape would be unfavourable or detrimental to defendant

- G The plaintiff was a client of the defendant, a stock broking company dealing in securities. On 3 June 1996, the plaintiff opened a CDS account and a trading account with the defendant through the defendant's account application form and was assigned a credit limit of RM100,000. PW3 was the plaintiff's remisier. On
- H 14 November 1997 PW3 informed the plaintiff of an offer in the market from TA Securities Sdn Bhd that if the plaintiff purchased 244,000 Pancaran Ikrab Berhad (Pancaran) shares at RM9 per share, the plaintiff would be given a further 245,000 Pancaran shares free of delivery and free of payment. The plaintiff agreed to accept the
- I offer. PW3 then raised a buy slip dated 14 November 1997 for the purchase of 244,000 Pancaran shares at RM9 per share with 245,000

Pancaran shares free of delivery and free of payment and the same was approved by the defendant's Executive Director (DW1) and Managing Director and Chief Executive Officer (DW2). The defendant's head of dealings (PW2) executed the purchase with one Matthew Loh from TA Securities Sdn Bhd and a contract note dated 14 November 1997 was sent out to the plaintiff confirming the purchase of the 244,000 Pancaran shares. The plaintiff then instructed PW3 to sell all the 489,000 Pancaran shares at the best possible price on 14 November 1997 itself. On 20 November 1997 the plaintiff discovered that his account received only 244,000 Pancaran shares and not the 245,000 Pancaran shares as TA Securities Sdn Bhd had failed to deliver the same. The plaintiff claimed to have suffered losses as a result of the defendant's breach and/or negligence over the non-delivery of the 245,000 free shares.

From DW1's evidence, it was clear that the plaintiff could safely sell the 244,000 shares and the 245,000 free shares on 17 November 1997. PW3's evidence showed that following the instruction to sell all the Pancaran shares, he sold most of the shares as shown in daily business done report dated 14 November 1997, 17 November 1997, 24 November 1997 and 25 November 1997 but not all as the price of Pancaran shares was crashing and he was hoping for a technical rebound. 275,000 shares were sold on 14 November 1997 for RM8.8378. On 17 November 1997, 105,000 shares were sold at RM5.0261 per share and another block of 245,000 shares were sold at RM8.8378 per share, bringing a total of 350,000 share and part of those shares were sold on 14 November 1997. The 275,000 shares sold on 14 November 1997 were readjusted to 245,000 on 17 November 1997 due to credit control measure where the defendant did some internal adjustment.

The defendant contended in its defence that the buy slip was not a confirmation of purchase and neither did the plaintiff's account show any purchase of the alleged free shares. The contract note contained no terms on the purchase of the 245,000 free shares. The transaction regarding the free shares was an arrangement made between the plaintiff and PW3 and the defendant denied any involvement. In the course of the trial, the defendant's counsel submitted that no contract existed between the plaintiff and the defendant. Instead, it was the understanding referred to by PW3 that was the contract, created between the plaintiff and TA Securities Sdn Bhd when the offer to sell by the latter was accepted by the former to purchase. As between the plaintiff and the

- A defendant, there was in existence only an agent-principal relationship and the role of the defendant was merely as a conduit for the purchase of the shares from TA Securities Sdn Bhd at the price which had been pre-determined by the parties, evident by the account opening form and the testimony of the plaintiff that the
- B defendant acted as his agent for the sale and purchase of shares on his behalf. The defendant was never at any time involved in the negotiation for the trade as per the Buy Slip, the defendant did not make the offer and the offer came from TA Securities Sdn Bhd. The defendant was merely confirming the contract between the
- C plaintiff and TA Securities Sdn Bhd.

Held (allowing the plaintiff's claim and entering judgment for RM1,228,482.50 with interest and costs):

- D (1) The creation of a contractual relationship between the plaintiff and the defendant was evident in the admission by DW2 that the contract between the plaintiff and the defendant was only in relation to the 244,000 Pancaran shares because the contract note said so. That very admission negated the defendant's contention that the relationship between the plaintiff and the
- E defendant was purely on an agent-principal basis be it whether DW2 wished to confine the contract to the 244,000 shares or otherwise. Besides this, the evidence of DW1 and PW3 on the defendant's responsibility connoted the defendant's contractual liability to the plaintiff to ensure delivery of the shares to him.
- F (para 11)
- (2) The trade that was transacted with the approval of the defendant constituted a purchase of 244,000 Pancaran shares at RM9 per share with 245,000 Pancaran shares free of delivery and free of payment as contained in the buy slip and not just the 244,000 Pancaran shares because (i) the only reason why the deal went through the direct deal was because of the free shares which could only be done through direct deal between two stock broking houses; (ii) DW2 admitted that the buy slip had contained all the necessary details as may be required by the defendant to conduct the direct deal. By reason of the fact that the Credit Control Department (CCD) had made its credit risk assessment and submitted the buy slip for the directors' signatures and that it was in fact signed by both DW1 and
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- I DW2 with the CCD subsequently giving its endorsement for the trade to proceed, left no room to doubt that the CCD, DW1 and DW2 had full knowledge that the trade PW2 must

confirm based on the buy slip was that there would be a purchase of 244,000 Pancaran shares at RM9 per share and there would also be with the purchase a free of delivery and free of payment of 245,000 Pancaran shares. Any suggestion that there was only one instruction *ie*, to buy 244,000 Pancaran shares at RM9 per share was inconsistent with the contemporaneous documents produced and the evidence adduced during the trial; (iii) the notation on the shares was already on the Buy Slip when it was brought before CCD, DW1, DW2 and PW2 and it is highly improbable for any of them to have missed it; (iv) acknowledgement of the 245,000 free shares by the defendant was also evident when the defendant increased the selling limit of the plaintiff and allowed the plaintiff to sell more than 244,000 shares; (v) acknowledgment of the free shares on the buy slip was further evident from a letter dated 20 November 1997 to one Mr. Ignatius Tan from TA Securities Sdn. Bhd. on the purchase of the 244,000 Pancaran shares and 245,000 Pancaran shares free of transfer to ensure that the above shares were transferred by Thursday (T+4) 20 November 1997; (vi) exh. P13 was a notice of insufficient stock balance issued by the operation department of the defendant to PW3 on 21 November 1997. When PW3 met up with DW1 and DW2 to discuss the counter measure for the short sale that had occurred when he sold 105,000 Pancaran shares on behalf of the plaintiff on 17 November 1997 he was told to write the remarks "seller/TA Sec failed to deliver us the free shares of 254,000". This piece of evidence and most importantly that which related to the defendant having the contract with TA Securities Sdn Bhd for the delivery of 489,000 shares was not challenged. Therefore the court was of the view that the defendant was fully aware that the free shares was part of the direct deal as written on the buy slip and the admission by DW2 must be read to be inclusive of the free shares. The defendant must be estopped from denying that they have no contractual link with the plaintiff over the said free shares. *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* (refd). (para 14)

- (3) The court was compelled to draw an adverse inference pursuant to s. 114(g) of the Evidence Act 1950 for the failure of the defendant to produce the tape recording which at all times was in the defendant's possession, custody and control of the tape

- A because its production would be unfavourable or detrimental to the defendant's case. *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* (dist). (paras 16 & 17)
- (4) DW2's assertion that there was no deal on the free shares because the contract note did not reflect the same was clearly without merits. Not having the contract note reflective of the free shares did not mean there was no trade with respect to the shares. Based on DW1's clarification, the reason why the contract note made no mention was because basically the confirmed part of the deal was the 244,000 Pancaran shares which was keyed in and matched in the KLSE System with the delivery also confirmed through the KLSE System. The 245,000 Pancaran shares being free of payment could not be confirmed through the KLSE System because for any trade to be transacted there must be a price to be arranged and one could not key into the system the price of zero. So technically speaking, the shares could not be considered as a purchase because for there to be a purchase, there must be an exchange of shares against price consideration. The contract note served as a written confirmation only of the details that were keyed into the KLSE System by PW2. As no free shares could be keyed into the System, naturally the contract note would not reflect the free shares. The contract note alone could not be the sole conclusive factor in determining whether the contract was not inclusive of the free shares but the entire circumstances must be worked out. *Malayan Banking Bhd v. PK Rajamani* (refd). (paras 18 & 19)
- (5) With regard to the defendant's contention that its agency status denied the plaintiff the right to sue the defendant, the court must look beyond the label "agent" to the actual facts of the situation. The ultimate test was whether it was intended that the defendant be an agent or the defendant was actually contractually bound by the terms in the buy slip to deliver the shares stipulated therein. The label put to the defendant by the description given by DW2 and by the plaintiff in that one instance and by DW1 in the manner he stated it, could not be the sole conclusive factor in determining whether the defendant was to act only as an agent. The entire circumstances must be looked at. Evidence evaluated in totality showed that the defendant acted not as an agent but a contracting party with the plaintiff. The transaction involved a crossing direct deal, as

- between the defendant and TA Securities Sdn Bhd. The plaintiff was represented by the defendant and the seller was represented by TA Securities Sdn Bhd. No evidence was led to show that the plaintiff was ever in direct contact with the seller nor the seller with him and neither did the plaintiff have any direct contact with TA Securities Sdn Bhd. It was the defendant that represented the plaintiff in the whole transaction until the completion of the direct deal. There was the understanding reached as mentioned by PW3 but that understanding could not constitute a contract because the nature of the deal involved a crossing which could only be transacted by the stockbrokers. The plaintiff then entered into a contractual relationship with the defendant. By approving the buy slip, the defendant had agreed to accept the plaintiff's instructions as stated in the buy slip and was contractually liable to deliver to the plaintiff 244,000 Pancaran shares with a further 245,000 Pancaran shares free of payment. Further, the fact that it was a salaried dealer like PW2 that was representing the defendant and not a remisier like PW3 was also a significant fact which showed the defendant's role in the direct deal was far from being a mere agent of the plaintiff. Therefore the defendant could not have merely acted as a conduit in the instant transaction but it was PW2 and Matthew Loh that had acted as conduits for and on behalf of the defendant and TA Securities Sdn Bhd respectively in facilitating the purchase as specified in the buy slip. *Syarikat Soon Theam Sdn Bhd v. H'ng Chye Jin* (dist); *Rashid Hussain Securities Sdn Bhd v. Chen Then Song* (dist); *Malayan Banking Bhd v. PK Rajamani*; *Woo Yew Chee v. Yong Yong Hoo, Marchant v. Charters* (refd). (paras 20, 21, & 22)
- (6) By failing to ensure delivery of the 245,000 Pancaran shares, the defendant was clearly in breach of the contract. Evidence adduced showed that the plaintiff had proved the damages that he claimed to have suffered. The 105,000 Pancaran shares were the shares that was actually sold by the plaintiff believing that he had those free shares. RM527,740.50 was the amount the plaintiff could have obtained for the sale of 105,000 shares at RM5.0261 per share. Evidence showed that PW3 did not sell the balance 140,000 shares. As there was a standing instruction by the plaintiff to sell all the 489,000 Pancaran shares, the plaintiff's losses for the 140,000 shares must be taken into account and could be quantified by using the average price

- A between the available periods 17 November 1997 and 24 November 1997. This came up to a total of RM530,571.50. Total amount which could be derived by the plaintiff for the 245,000 free shares if he was able to sell between 17 November 1997 and 24 November 1997 was RM1,228,482.50. On the
- B evidence adduced, the court held that the plaintiff had proved his claim on the balance of probabilities and judgment was entered for the plaintiff in the sum of RM1,228,482.50 with interest at the rate of 8% per annum from the date of judgment until full realization and costs. (paras 24, 25 & 26)
- C **Case(s) referred to:**
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC (**refd**)
Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA (**dist**)
- D *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25 SC (**refd**)
Marchant v. Charters [1997] 3 All ER 918 (**refd**)
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC (**refd**)
Rashid Hussain Securities Sdn Bhd v. Chen Then Song & Ors [2001] 7 CLJ 137 HC (**dist**)
- E *Syarikat Soon Theam Sdn Bhd v. H'ng Chye Jin* [1974] 1 LNS 162 HC (**dist**)
- Legislation referred to:**
Contract Act 1950, s. 183
- F Evidence Act 1950, s. 114(g)
- For the plaintiff - Sharon Balasingam (AM Pillai with him); M/s Arulamapalam & Co*
For the defendant - Ramesh; M/s Chellam Wong
- G *Reported by Susheila Sreedharan*

JUDGMENT

H **Nor Bee Ariffin JC:**

- I [1] The plaintiff was a client of the defendant, a stock broking company dealing in securities. On 3 June 1996, the plaintiff opened a CDS account and a trading account with the defendant through the defendant's account application form (exh. P1) and was assigned a client's number 3LEO763 and a credit limit of RM100,000. PW3 was the plaintiff's remisier. On 14 November 1997 PW3 informed the plaintiff of an offer in the market from TA Securities Sdn. Bhd.

that if the plaintiff purchased 244,000 Pancaran Ikrab Berhad (Pancaran) shares at RM9 per share, the plaintiff would be given a further 245,000 Pancaran shares free of delivery and free of payment. The plaintiff agreed to accept the offer. PW3 then raised a Buy Slip dated 14 November 1997 (exh. P2) for the purchase of 244,000 Pancaran shares at RM9 per share with 245,000 Pancaran shares free of delivery and free of payment and the same was approved by DW1 and DW2. PW2 executed the purchase with one Matthew Loh from TA Securities Sdn Bhd and a contract note dated 14 November 1997 (exh. D4) was sent out to the plaintiff confirming the purchase of the 244,000 Pancaran shares. The plaintiff then instructed PW3 to sell all the 489,000 Pancaran shares at the best possible price on 14 November 1997 itself. It was on 20 November 1997 that the plaintiff came to know that his account received only 244,000 Pancaran shares and not the 245,000 Pancaran shares as TA Securities Sdn. Bhd. had failed to deliver the same. The plaintiff claimed to have suffered losses as a result of the defendant's breach and/or negligence over the non-delivery of the 245,000 free shares.

[2] The defendant contended in its statement of defence that the Buy Slip was not a confirmation of purchase and neither did the plaintiff's account show any purchase of the alleged free share. The contract note contained no terms on the purchase of the 245,000 free shares. The transaction regarding the free shares was an arrangement made between the plaintiff and PW3 and the defendant denied any involvement. The defendant further contended that delivery of free shares contravened the KLSE's regulations.

[3] On the plea that the free shares contravened the KLSE's regulations, the learned counsel Mr. AM Pillai submitted rather at length the reasons why the contention must fail. It seems to me that the contention appeared to have been abandoned by the defendant as no evidence was led on the subject matter. Be that as it may, it is evident from the testimony of DW1 who has 24 years experience in the industry that although the giving of shares free of delivery and free of payment was not a standard practice but it was not something unheard of in the industry and there was nothing illegal in the trade. The defendant itself had undertaken similar transactions evident by the Sell Slips in exhs. P5, P6, P7 and P8 prepared by PW3, all of which bear DW1's initials for the account of Multi Purpose Bank. DW2 agreed that exhs. P5, P6, P7 and P8

- A were Sell Slips of the defendant involving direct crossing deals, and there was a notation on each that there would be shares free of delivery, free of payment. All transactions went through. The defendant could not have done it many times over if such transaction is illegal.
- B [4] The trial first commenced before Zaleha Zahari J (as she then was) where three witnesses gave evidence, namely the plaintiff himself as PW1, PW2 and PW3 whose testimony was yet to be cross-examined. The issue to be determined as contained in ikatan dokumen C is whether there was in existence an agreement between
- C the plaintiff and the defendant that if the plaintiff purchased 244,000 Pancaran shares through the defendant at RM9 per share, then the plaintiff would receive 245,000 additional Pancaran shares for free.
- D [5] Mr. Ramesh Kanapathy, the learned counsel for the defendant at the outset of his written submission questioned the plaintiff's attempt in asking the court to determine an unpleaded issue. The plaintiff, he said, made no reference at all to any contract or
- E agreement between the plaintiff and the defendant in its pleading and therefore I am not duty bound to make any determination on the issue. Admittedly, Ikatan Dokumen C was prepared and signed only by the plaintiff's counsel but the court's record shows that the trial had from the start commenced and proceeded on that very
- F issue which had the approval of the previous learned counsels for the defendant on 12 March 2003 as evident by the draft appended to the written submission of the learned counsel for the plaintiff. Quite apart from that, a perusal through the plaintiff's amended statement of claim would show that the plaintiff's cause of action was based on a breach of contract and that sufficient facts were
- G pleaded by the plaintiff to raise such cause of action. The defendant in its defence had also admitted to the existence of a contractual relationship. I think it is most inappropriate and unfair for the learned counsel to be allowed to go back on the agreement the parties had reached on the issue to be tried (*Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716). On that note, I
- H proceed to hear the case with the issue remaining unchanged.
- I [6] The parties were at variance again on pleadings when Mr. AM Pillai submitted that the existence of an agent-principal relationship was not pleaded by the defendant. Mr. Ramesh had in his written submission stated that the defendant was an agent of

the plaintiff for purposes of transacting shares in the KLSE and such relationship was pleaded at para. 4 of the statement of defence. I have no reason to hold otherwise.

[7] In addressing the issue at hand, it would be useful to first appreciate the internal organization of the defendant and the procedures observed by the company in managing a direct deal transaction. The evidence of DW1 and DW2 which sheds light on the matter is briefly summed up by saying that DW2 who is currently the defendant's managing director as well as its Chief Executive Officer was at the material time the executive director responsible for the overall management of the company. DW1 was then the executive director responsible for matters including the remisiers, trading, credit limit, finance, credit control. PW3 was a remiser and a commissioned dealer representative of SJ Securities Sdn. Bhd. PW2 was the head of dealings of the defendant's company. He was a salaried dealer and an employee of the defendant as opposed to remisiers like PW3.

[8] On the procedures, a Buy Slip was introduced by the defendant to be used in a direct deal transaction. A dealer representative or remiser (PW3 in this case) will fill up the Slip and pass the same to the Credit Control Department (CCD). The CCD will assess the client's credit limit to see whether it is appropriate for the defendant to proceed with the trade. As stated earlier, the plaintiff's credit limit was RM100,000 but this limit may be varied with the approval of the directors. The internal policy of the company requires transaction exceeding RM100,000 to carry the signature of a director. If the CCD decides to proceed with the trade, the CCD will have to get DW1's approval if it is above their own approving limit. If a director gives his approval and he signs the buy slip, the authorized dealer representative (PW2 in this case) will then confirm the details of the purchase in the terms stated in the said buy slip by phone with his counterpart in the other stock broking company (Matthew Loh in this case). Following the confirmation, he then will key in the quantity of the shares to be purchased. The other stock broking company will key in the opposite of the trade and the trade is matched in the KLSE System. The authorized representative will confirm back with the CCD that the particular deal has been put through the KLSE System and has been matched. The defendant will issue a contract note to the client to inform him of the details of the trade transacted. If the

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- A direct deal involves free shares, the authorized dealer will not key in the free shares but there will be telephone confirmation by him with the authorized dealer on the other side. There is no contract note for the free shares. The client has to check with his remisier to confirm.
- B [9] It is common ground that the transaction in dispute involved a direct deal or a direct business as it may be referred to interchangeably. A direct deal is a deal transacted off the market. Evidence was adduced to distinguish between a trade that is transacted in the KLSE and a direct deal. The former relate to an order whether to buy or to sell a stock at a certain price that would be keyed in through the KLSE System where the buyer and the seller would be automatically matched. In that instance, one would not be aware of whom he bought the shares from or to whom he sells the shares to. As regards a direct deal, PW2, PW3, DW1 and DW2 had their own versions of what the transaction is all about but basically all based their interpretations on the definition prescribed in r. 14(1)(b) of the Rules For Trading By Member Companies of the KLSE as stated by DW2 which reads as follows:
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- E (1)(a) direct business means any business transacted outside the “Automated Trading System” and shall include:
- F (i) crossings, that is transactions between two Member Companies; or
- F (ii) married transactions between two clients within a Member Company; or
- (iii) any other transactions as determined by the Committee from time to time.
- G (b) All direct business must be reported in accordance with the regulations and procedures as prescribed by the Committee from time to time.
- H DW1 explained that in a direct deal, the buyer and the seller would have pre-arranged the deal to transact at a certain price. It is agreed by the parties that the deal transacted by the plaintiff involved a crossing deal, ie, a transaction between two member companies, the defendant and TA Securities Sdn Bhd.
- I [10] Mr Ramesh submitted that there was no contract existed between the plaintiff and the defendant. Instead, it was the understanding referred to by PW3 that was the contract, created between the plaintiff and TA Securities Sdn Bhd when the offer to

sell by the latter was accepted by the former to purchase. As between the plaintiff and the defendant, there was in existence only an agent-principal relationship and the role of the defendant was merely as a conduit for the purchase of the shares from TA Securities Sdn Bhd at the price which had been pre-determined by the parties, evident by the account opening form exh. P1 and the testimony of the plaintiff that the defendant acted as his agent for the sale and purchase of shares on his behalf. The defendant was never at any time involved in the negotiation for the trade as per the buy slip, the defendant did not make the offer and the offer came from TA Securities Sdn Bhd. The defendant was merely confirming the contract between the plaintiff and TA Securities Sdn Bhd. The learned counsel cited the case of *Rashid Hussain Securities Sdn Bhd v. Chen Then Song & Ors* [2001] 7 CLJ 137 in support of his contention.

[11] To my mind, the creation of a contractual relationship between the plaintiff and the defendant was admitted to by DW2 when he said these:

Clearly in my mind, without any shadow of doubt that the contractual obligation of SJ is confined to the purchase and delivery of 244,000 shares of Pancaran at RM9. I approved the direct deal on that basis.

That very admission negates all contentions by the defendant that the relationship between the plaintiff and the defendant was purely on an agent-principal basis, be it whether DW2 wished to confine the contract to the 244,000 shares or otherwise. Besides the admission by DW2, there are also other evidence to show that the defendant could not have acted only as an agent of the plaintiff. The plaintiff might have said that “Saya setuju defendan adalah agen terhadap pembelian/penjualan saham bagi saya”. DW2 also, despite his admission, maintained that the defendant acted as agent and DW1 was also heard to have said the same thing. Notwithstanding what was said, DW1 also went on to confirm that it was the duty of the defendant to ensure the delivery of the shares. There was also the evidence of PW3 that it was the defendant which bears the responsibility to deliver the shares. The evidence of both witnesses as regard the responsibility of the defendant connotes the defendant’s contractual liability to the plaintiff to ensure the delivery of the shares to him.

- A [12] On the admission by DW2 that the contract between the plaintiff and the defendant was only in relation to the 244,000 Pancaran shares because the contract note said so, it is only common sense that if the trade as stipulated in the Buy Slip was inclusive of the 245,000 Pancaran shares, then the 245,000 shares free of payment must have formed part of the contract. To establish that, one needs to ask what was the trade that was transacted then, whether the purchase of 244,000 Pancaran shares at RM9 per share came with it 245,000 additional Pancaran shares free of delivery and free of payment or it was only the 244,000 shares? PW3 and DW1 confirmed that it was inclusive of the free shares as contained in the Buy Slip whilst PW2 and DW2 disputed that the free shares was part of the bargain.
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- D [13] There was no evidence to contradict the testimony of PW3 that the buy slip was raised by him after he had discussed the matter with DW1 who gave his verbal approval. DW1 could not remember the details of this transaction but he did not rule out the possibility that PW3 might have called him up to inquire before raising the Buy Slip. Explaining the Buy Slip, PW3 said that the box was for order entry only and in this case was stated as 244,000 for quantity and price RM9. That he said was the instruction for PW2 to key into the KLSE System of 244,000 shares for RM9. On the right hand side of the buy slip was the details of the direct deal whereby his client wanted to buy 244,000 Pancaran shares at RM9 per share from TA Securities Sdn Bhd and there would be 245,000 of Pancaran shares free of delivery and free of payment. PW3 further testified that when the Buy Slip was given to DW1, he knew that with the purchase of the 244,000 shares the plaintiff would get 245,000 free shares.
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- G [14] I entertain no doubt that the trade that was transacted with the approval of the defendant constituted a purchase of 244,000 Pancaran shares at RM9 per share with 245,000 Pancaran shares free of delivery and free of payment as contained in the Buy Slip and not just the 244,000 Pancaran shares for very obvious reasons, namely:
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- I (a) as testified by PW3, if the contract was going at RM9 for 244,000 shares, the plaintiff need not go through the direct deal process because based on the stock market price on 14 November 1997 which range from 6.70 to 9.90, the plaintiff would have got 244,000 at RM9 itself or even cheaper at the

- open market. The only reason why the deal went through the direct deal was because of the free shares which can only be done through direct deal between two stock broking houses. Although DW1 could not recall much of what had transpired in the transaction but he testified that he gave his approval and he signed the Buy Slip when the defendant's CCD forwarded the buy slip to him for his signature pursuant to the defendant's internal policy. The transaction amount was roughly RM2.2 million, 244,000 x RM9;
- (b) DW2 and PW2 testimonies that the direct deal did not involve any free shares as the contract note made no reference as such are certainly devoid of merits. DW2 admitted that the buy slip had contained all the necessary details as may be required by the defendant to conduct the direct deal. By reason of the fact that the CCD had made its credit risk assessment and had submitted the Buy Slip for the signatures of the directors and that it was in fact signed by both DW1 and DW2 with the CCD subsequently giving its endorsement for the trade to proceed, leaves no room to doubt that the CCD, DW1 and DW2 had full knowledge that the trade PW2 must confirm based on the Buy Slip was that there would be a purchase of 244,000 Pancaran shares at RM9 per share and there would also be with the purchase a free of delivery and free of payment of 245,000 Pancaran shares. Any suggestion that there was only one instruction ie, to buy 244,000 Pancharan shares at RM9 per share is inconsistent with the contemporaneous documents produced and the evidence adduced during the trial;
- (c) the notation on the shares was already on the buy slip when it was brought before CCD, DW1, DW2 and PW2 and it is highly improbable for any of them to have missed it. DW1 further testified that when PW2 confirmed the trade with Matthew Loh, he should have confirmed the terms stipulated on the buy slip as the transaction to be executed could not be done on any other terms;
- (d) acknowledgement of the 245,000 free shares by the defendant was also evident when the defendant increased the selling limit of the plaintiff and allowing the plaintiff to sell more than 244,000 shares. The defendant had updated the selling limit of the plaintiff for 105,000 that was sold on 17 November 1997. The amount of shares that would have to be in the defendant's or the plaintiff's account before TA was paid was 489,000 shares;

- A (e) acknowledgment of the free shares on the buy slip is further
evident from a letter of 20 November 1997 written to one
Mr Ignatius Tan from TA Securities Sdn Bhd on the purchase
of the 244,000 Pancaran shares and 245,000 Pancaran shares
free of transfer (exh. P3) to ensure that the above shares were
B transferred by Thursday (T+4) 20 November 1997. By its
content, the said letter was obviously making its reference to
both the delivery of the 244,000 and 245,000 free shares which
were to be delivered by 20 November 1997. Neither DW1 nor
DW2 could recollect whether they had asked PW2 to write the
C letter but DW2 agreed that the letter was written and signed by
PW2 for and on behalf of the defendant and he assumed that
the number of shares referred to in exh. P3 corresponded with
what was written in the buy slip;
- D (f) exhibit P13 was a notice of insufficient stock balance issued by
the operation department of the defendant to PW3 on
21 November 1997. According to PW3, when he met up with
DW1 and DW2 to discuss the counter measure for the short
E sale that had occurred when he sold the 105,000 of the
Pancaran shares on behalf of the plaintiff on 17 November 1997,
he was assured by both the directors not to worry as the
defendant had the contract with TA Securities Sdn Bhd for the
delivery of 489,000 shares. When PW2 asked how he could
F protect himself as the broker for the plaintiff, they then called
the operation department to prepare the notice in exh. P13
which was to advise PW3 that one of his client had insufficient
shares in his account for delivery and also to state the reason
for the occurrence. To protect himself further, he was told to
write the remarks "seller/TA Sec failed to deliver us the free
G shares of 254,000." This piece of evidence and most
importantly that which relates to the defendant having the
contract with TA Securities Sdn Bhd for the delivery of 489,000
shares, was not challenged. Although DW1 could not recall
whether PW2 had indeed seen him on the matter but he did
H not dispute the contents of the notice. DW2 insisted that
exh. P13 made no reference to short selling and there was
indeed no occurrence of short selling but rather the case of
shares not delivered to the defendant. DW2's contention is
misconceived as the contents of the notice stated in no
I uncertain terms the following:

Please treat this matter as urgent to refrain from buy-in for your client account and that the company shall not be liable nor responsible for any loss arising from the above buy-in.

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Kindly furnish us the reason(s) for any failure to deliver.

By reasons thereof, I am of the view that the defendant was fully aware that the free shares was part of the direct deal as written on the buy slip and and the admission by DW2 must be read to be inclusive of the free shares. The defendant must be estopped from denying that they have no contractual link with the plaintiff over the said free shares (*Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283).

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[15] PW2 testified that the details of the purchase in the terms stated in the buy slip went through him and the deal was executed upon confirmation of the trade by phone with Matthew Loh from TA Securities Sdn Bhd, and the terms of the buy slip was subsequently confirmed by PW2 on PW3's terminal. PW2 said that there was a recording of the conversation between him and Matthew in relation to the direct deal but he recalled no mention was made on the free shares. To dispel any doubt whether PW2 had indeed confirmed the delivery of the free shares with Matthew Loh, the tape recording would be the best piece of evidence. DW2 said that there were no regulations that set the time frame for keeping the recordings but he normally would keep them for three years except if required by lawyers, the courts or the authorities like the securities commission or the KLSE. DW2 said he became aware of the plaintiff's claim made against the defendant in the letter of demand dated 15 October 1998 (exh. P14). When he received the letter of demand, DW2 said he would think that the tape was there but at the same time, claimed that his secretary might have recycled or reused the tape as they did not have enough tapes to go around and he did not know exactly what his secretary did.

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[16] Mr AM Pillai urged the court to draw an adverse inference pursuant to s. 114(g) of the Evidence Act 1950 for the failure of the defendant to produce the tape recording. The learned counsel submitted that DW2 should have looked for the tape especially when he agreed that the tape recording could have clarified a lot of things in the trial. Mr Ramesh submitted that it was not the duty of the defendant to produce the tape recording based on the authority of *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri*

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- A *Johor* [1996] 4 CLJ 1. In that case, the appellant rented one unit of low cost house built by the respondent. The tenancy was for three years with an option to the appellant to purchase the unit by giving a three - month written notice. The appellant exercised his option out of time. The respondent however waived the breach and offered to sell the unit at RM14,000. The appellant rejected the offer and eventually notices to quit were issued by the respondent. The main issue for determination was whether one Tan Sri Dato' Basir Ismail who was then a director of the respondent had in fact verbally promised on behalf of the respondent to sell the said unit to the appellant at between RM7,000 to RM8,000. Pursuant to the appellant's failure to secure the presence of the Tan Sri, an attempt was made by the appellant to raise the presumption under s. 114(g) of the Evidence Act 1950 against the respondent. On whether such a presumption could be raised against the respondent, Abdul Malek Ahmad JCA held that it was the appellant, under the rules of evidence, who should call the Tan Sri to prove its case and not hope for the respondent to do so. The appellant's failure to do so did not mean that the burden shifted to the respondent who was in fact denying the allegation. Section 114(g) of the said Act could not be applied against the respondent and in fact that provision should apply against the appellant.

- [17] The circumstances in the present case however must necessarily be distinguished from the authority cited. It is an undisputed fact that the tape recording was at all times in the possession, custody and control of DW2. Only he has access to the tape which was kept well locked up in his safe and only he too that has the combination of the safe. Being an executive director with 20 odd years experience in the security industry, one would have thought that on receiving the letter of demand which was well within the duration of time the tape would normally be kept, DW2 would have quickly looked into the safe and retrieved the tape as the defendant was then being threatened with a legal action. From the date the recording of the telephone conversation was made on 14 November 1997 till the date the present suit was filed on 14 January 1999 and going by his own evidence that he would keep the tape for three years, there is certainly no reason why the tape should not be in his safe when he received the letter of demand. With the receipt of the letter of demand, DW2 should have taken measures to ensure the availability and safety of the tape as it certainly would be a crucial piece of evidence and as he himself had admitted, the tape recording would have answered a lot of

questions. There is no way the plaintiff could have produced the tape to this court under such circumstances. Even assuming the plaintiff or his solicitor had asked for the production of the tape prior to the hearing date, DW2 was in no position to produce the same as his secretary might prematurely have the tape recycled or reused before it was due to be. Under the circumstances, I feel compelled to draw an inference under s. 114(g) of the Evidence Act 1950 that the tape was not produced in court by the defendant which at all times has the possession, custody and control of the tape because its production was unfavourable or detrimental to the defendant's case. On whether Matthew Loh should have been called, I am of the view since PW2 has testified that he did not recall mentioning about the free shares in the telephone conversation, the best evidence in this instance would still be the tape recording.

[18] The reason DW2 maintained his assertion that there was no deal on the free shares was because the contract note (exh. D4) did not reflect the same is clearly without merits. Not having the contract note reflective of the free shares does not mean that there is no trade with respect to the shares. Based on the clarification by DW1, the reason why the contract note made no such mention was because basically the confirmed part of the deal was the 244,000 Pancaran shares which was keyed in and matched in the KLSE System with the delivery also confirmed through the KLSE System. The 245,000 Pancaran shares being free of payment could not be confirmed through the KLSE System because for any trade to be transacted there must be a price to be arranged and one cannot key into the system the price of zero. So technically speaking, the shares could not be considered as a purchase because for there to be a purchase, there must be an exchange of shares against price consideration. The contract note served as a written confirmation only of the details that were keyed into the KLSE System by PW2. As no free shares can be keyed into the System, naturally the contract note would not reflect the free shares.

[19] The contract note alone cannot be the sole conclusive factor in determining whether the contract was not inclusive of the free shares but the entire circumstances must be worked out. In *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25, the issue was whether the facility given in the letter of 7 March 1986 was a new facility or a continuing facility secured by the existing charges. In ruling that it was a continuing facility, the Supreme Court held that:

- A In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance (*Woo Yew Chee v. Yong Yong Hoo* [1979] ...
- B 131, 133 FC; *Addiscombe Garden Estates Ltd v. Crabbe* [1958] 1 QB 513 CA).

- The facts in *Malayan Banking Bhd v. PK Rajamani* is by no comparison similar to the present case but the statement of principles stated therein is undoubtedly applicable in saying that the actual facts of the case must be looked at and the actual facts of the present case shows that the contract note only indicates a half portion of the trade whilst the other half is to be by the confirmation made by the CCD and the evidence of PW3 showed that PW2 had made the confirmation of the trade on PW3's terminal. It must be stressed that the defendant issued the contract note to the plaintiff only after the purchase of the shares through the direct deal had been completed by PW2. PW2's testimony that he did not recall any mention of free shares in his conversation with the dealer in TA Securities Sdn Bhd is inconsistent with his own letter of 20 November 1997 (exh. P3) which I had mentioned earlier on.
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- [20] Coming back to the agent-principal relationship between the plaintiff and the defendant, the defendant is contending that its agency status denies the plaintiff the right to sue the defendant. The case of *Syarikat Soon Theam Sdn Bhd v. H'ng Chye Jin* [1974] 1 LNS 162; [1975] 1 MLJ 259 was cited by Mr. Ramesh to show that "a sharebroker is by his designation not a contracting party but is an agent who arranges for the "marriage" of an offer to buy with an offer to sell" (at p. 260). This case is distinguishable in that the nature of business as between the parties is not related to a direct deal transaction which is an off-market transaction and therefore different considerations would have applied. Rashid Hussain Securities Sdn Bhd relate to a married direct deal, ie, transaction between two clients of the plaintiff. The contention in that case was that the plaintiff being the disclosed agent of the 1st and 2nd defendants in the sales of the shares cannot sue the 3rd defendant as that right vests only on the 1st and 2nd defendants and Kang Hwee Gee J (as he then was) said these:
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- I This aspect of the law of agency in contract is expressed in the first paragraph of s. 183 of the Contracts Act 1950 which reads as follows:

183. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

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The general rule that an agent for a disclosed principal possess neither rights nor liabilities with regard to third parties, stems from the simple logic of attributing the act of the agent to the principal, as Wright, J in *Montgomerie v. United Kingdom Steamship Association* [1891] 1 QB 370 said at 371:

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The contract is the contract of the principal, not that of the agent, and *prima facie* at common law the only person who can sue is the principal and the only person who can be sued is the principal.

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The rule is far from inflexible as the words “in the absence of any contract to that effect,” in s. 183 clearly provides. It may be excluded by the implied or express intention of the contracting parties and it is purely a question of construction in each case whether the agent is liable and to what extent he is liable ...

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[21] Bearing in mind the decision in *Rashid Hussain Securities Sdn Bhd* on the reading of s. 183 of the Contract Act 1950 and applying the principles of law stated in *Malayan Banking Bhd v. PK Rajamani*, the court must look beyond the terminology of the label “agent” to the actual facts of the situation. The ultimate test is whether it was intended that the defendant be an agent or the defendant was actually contractually bound by the terms in the Buy Slip to deliver the shares stipulated therein. In the case of *Woo Yew Chee v. Yong Yong Hoo*, Raja Azlan Shah Ag CJ (as His Majesty then was) cited the remark by Lord Denning MR in *Marchant v. Charters* [1997] 3 All ER 918, 922 as follows:

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It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is exclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?.

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[22] The label put to the defendant by the description given by DW2 and by the plaintiff in that one instance and by DW1 in the manner he stated it cannot be the sole conclusive factor in

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- A determining whether the defendant was to act only as an agent. The entire circumstances must be looked at. Evidence evaluated in totality shows that the defendant acted not as an agent but a contracting party with the plaintiff. The transaction involved a crossing direct deal, as between the defendant and TA Securities
- B Sdn Bhd. The plaintiff was represented by the defendant and the seller was represented by TA Securities Sdn Bhd. No evidence was led to show that the plaintiff was ever in direct contact with the seller nor the seller with him and neither did the plaintiff has any direct contact with TA Securities Sdn Bhd. It was the defendant
- C that represented the plaintiff in the whole transaction until the completion of the direct deal. There was the understanding reached as mentioned by PW3 but that understanding could not constitute a contract because the nature of the deal involved a crossing which could only be transacted by the stockbrokers. The plaintiff then
- D entered into a contractual relationship with the defendant. By approving the buy slip, the defendant has agreed to accept the plaintiff's instructions as per the terms clearly stated in the buy slip and was contractually liable to deliver to the plaintiff 244,000 Pancaran shares with a further 245,000 Pancaran shares free of
- E payment. DW1 testified on this obligation to deliver. Evidence was adduced to show that the defendant paid TA Securities Sdn Bhd for the 244,000 Pancaran shares that was received. The plaintiff on the hand, was contractually liable to pay the defendant the contract sum of RM9 per share for the 244,000 Pancaran shares. Looking at the
- F various passages the buy slip had gone through in getting the defendant's approval, it does not appear to me to be a case of purely maintaining good corporate governance as portrayed by DW1 but rather as said by DW1, the defendant had to be comfortable with the deal from the credit assessment and the purchase amount
- G against the trading limit before deciding whether it was appropriate for the defendant to proceed with the trade. DW2 said he approved the buy slip because RM2 million was an amount not too detrimental or causing too much exposure to the company compared to what a deal of RM20 million would have been. The
- H reason for such credit assessment and evaluation is simple, that is to ensure the plaintiff's ability to pay for the shares in order to honour his part of the bargain. The fact that it was a salaried dealer like PW2 that was representing the defendant and not a remisier like PW3 is in my view also a significant fact which shows the
- I defendant's role in the direct deal is far from being a mere agent of the plaintiff. There is also no reason for the defendant to write the letter of 20 November 1997 (exh. P3) to TA Securities Sdn

Bhd if they are not contractually obligated to the plaintiff. It follows therefore the defendant could not have merely acted as a conduit in the instant transaction but as put by Mr AM Pillai, it was PW2 and Matthew Loh that had acted as conduits for and on behalf of the defendant and TA Securities Sdn Bhd respectively in facilitating the purchase as specified in the buy slip. For the reasons stated, I conclude that the issue posed for determination is answered in the affirmative.

[23] Evidence was led to show that TA Securities Sdn Bhd had to transfer the shares to the plaintiff's CDS account by 12.30 on 20 November 1997. The buy slip did not indicate when the delivery of the free shares was to be. DW1 stated that the settlement would depend on what has been negotiated earlier on but the normal assumption would be that the shares free of payment would be delivered at the same time as the other shares that was purchased. That seemed to be the case because if it was any other date, exh. P3 would not have stated "Kindly ensure that the above shares are transferred by Thursday (T+4) 20 November 1997." There was also evidence to show that as there was a shortfall of 105,000 shares on 17 November 1997, KLSE had instituted a mandatory buy-in to cover the shortfall and that the plaintiff was not penalized for the shortfall as there was no intentional overselling. There was no action taken against the plaintiff for having insufficient shares in his account with the defendant. Such inaction necessarily implies the defendant's acknowledgment that the problem occurred was due to its own failure to secure the transfer of the free shares from TA Securities Sdn Bhd into the plaintiff's account.

[24] By failing to ensure the delivery of the 245,000 Pancaran shares, the defendant was clearly in breach of the contract. On the claim for damages suffered, Mr Ramesh submitted that the plaintiff had failed to prove the damages that he claimed to have suffered. Evidence adduced however showed otherwise. After the completion of the direct deal, the plaintiff gave instructions on 14 November 1997 to PW3 to sell all the Pancaran shares at the best possible price and he would have more than 489,000 Pancaran shares because of his earlier purchase of the shares. In explaining when the plaintiff could sell the shares he purchased in the direct deal, DW1 said in a normal market day which is on the market, if one is to buy shares, one can sell them on the same day but in a direct deal, the shares would be delivered into the CDS Account only on T+3 (Transaction Date + 3 Business Day) but reflected as free

- A balance on T+4 (Transaction Date + 4 Business Day). So the client would be able to sell on the first business day after the transaction without waiting for the delivery. In other words, one can only sell one day after the transaction because a share is not credited as a free balance in the CDS account until T+4. The
- B shares must be shown as free balance before one could sell because if the shares are to be sold on the same day as the transaction, there could be a possibility of there be insufficient shares in the client's CDS account showing as free balance in order to make delivery for the sale and that could lead to buying in of the shares.
- C Looking at exh. P9, buying and selling took place on 14 November 1997 but DW1 stated that the plaintiff would be able to sell his free shares as well as the other shares in the direct deal on 17 November 1997, on the assumption that the free shares were delivered.
- D [25] From the evidence of DW1, it is clear that the plaintiff could safely sell the 244,000 shares and the 245,000 free shares on 17 November 1997. Evidence by PW3 showed that following the
- E instruction to sell all the Pancaran shares, he sold most of the shares as shown in daily business done report dated 14 November 1997, 17 November 1997, 24 November 1997 and 25 November 1997 (exhs. P9, P10, P11 and P12 respectively) but not all as the price of Pancaran shares was crushing and he was hoping for a technical rebound. 275,000 shares were sold on 14 November 1997
- F for 8.8378. Exhibit P10 shows that on 17 November 1997, 105,000 shares were sold at RM5.0261 per share and another block of 245,000 shares were sold at RM8.8378 per share, bringing a total of 350,000 share and part of those shares were sold on 14 November 1997 (15 November 1997 and 16 November 1997 were weekends).
- G The 275,000 shares sold on 14 November 1997 were readjusted to 245,000 on 17 November 1997 due to credit control measure where the defendant did some internal adjustment. The 105,000 Pancaran shares were the shares that was actually sold by the Plaintiff believing that he had those free shares. RM527,740.50 was the
- H amount the plaintiff could have obtained for the sale of 105,000 shares at RM5.0261 per share. As for the balance shares of 140,000, evidence shows that PW3 did not sell them. As there was a standing instruction by the plaintiff to sell all the 489,000 Pancaran shares, the plaintiff's losses for the 140,000 shares must be taken
- I into account and can be quantified by using the average price between the available periods 17 November 1997 and 24 November 1997 based on exhs. P10 and P11 as worked out by Mr AM Pillai

in his written submission. This comes up to a total of RM530,571.50. Total amount which could be derived by the plaintiff for the 245,000 free shares if he was able to sell between 17 November 1997 and 24 November 1997 was RM1,228,482.50.

[26] On the evidence adduced, I hold that the plaintiff has proved his claim on the balance of probabilities and judgment is entered for the plaintiff in the sum of RM1,228,482.50 with interest at the rate of 8% per annum from the date of judgment until full realization and costs.

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